IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation, Plaintiff, v. PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES VON BERNUTH, JOHN HERKLOTZ, an individual, Defendants.	)	CIVIL DIVISION No.: 00-CV-2041

DEFENDANT'S MOTION TO
TRANSFER VENUE PURSUANT TO TITLE 28 U.S.C. §1404(a)

AND NOW comes the Defendant, John Herklotz, (hereinafter "Herklotz" or "Mr. Herklotz"), by and through his attorneys, Burns, White & Hickton, LLC and John P. Sieminski, Esq., and files the within Motion to Transfer Venue pursuant to Title 28 U.S.C. §1404(a) and in support thereof, avers the following:

I. FACTS

1. Plaintiff, WRS (hereinafter "Plaintiff") initiated the above-referenced cause of action by filing a Complaint on October 13, 2000.

2. Defendant Herklotz is currently Eighty-Two (82) years of age and a resident of the State of California. At the time the Complaint in this action was filed, Mr. Herklotz was Seventy-Six (76) years of age. Although Mr. Herklotz has traveled to Pittsburgh on a number of occasions to attend to matters associated with this case, his

health has recently deteriorated, making it much more difficult for him to travel than it has been in the past. Mr. Herklotz directs the Court to the letter from his physician, Wadie Najm, MD, MSED, attached to this Motion as Exhibit "A."

3. Upon information and belief, the other individual and corporate defendants in this matter, Defendant Eric Parkinson, Defendant Charles Von Bernuth and Defendant Plaza Entertainment, Inc. ("Plaza") are citizens of the State of California and either reside or have a principal place of business in the State of California. Defendant Herklotz fully intends, upon the trial of this matter, to call Mr. Parkinson and Mr. Von Bernuth as witnesses, both individually and in their respective capacities as officers and directors of Plaza. To the best of Mr. Herklotz' knowledge, individual Defendants Parkinson and Von Bernuth have never traveled to Pittsburgh to attend to any matters pertaining to this case. In fact, the Court has entered defaults on the record as to Parkinson, Von Bernuth and Plaza. Accordingly, it is unrealistic to believe that Parkinson, Von Bernuth, or any representative of Plaza would attend a trial when it is scheduled. In addition, because of their location in California, these parties are beyond the subpoena power of this Court. (See F.R.C.P. 45 (c) (3) (A) (ii)).

4. In addition to the parties referred to in paragraph 3, above, Mr. Herklotz intends to call as witnesses at trial at least two other persons believed to be citizens and residents of the State of California, namely Neil Carrey, Esq. and Thomas Gehring, Esq. Both of these individuals are beyond the subpoena power of this Court. (See F.R.C.P. 45 (c) (3) (A) (ii)).

II. CHANGE OF VENUE PURSUANT TO TITLE 28 U.S.C. §1404(a)

5. This Court is vested with the discretion in considering whether to transfer an action to a more appropriate venue pursuant to Title 28 U.S.C. §1404(a), which provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” Because of the nexus of the transactions that form the basis of the Plaintiff’s complaint to the State of California, this matter could have been filed in a United States District Court in California.

6. Section 1404(a) vests this Court with discretion to adjudicate motions for transfer according to an "individualized, case-by-case consideration of convenience and fairness" and that it requires the courts to weigh in the balance, a number of case-specific factors. *Stewart Organization, Inc. v. Ricoh Corp.,* 487 U.S. 22, 29 (1988).

7. Furthermore, the Third Circuit Court of Appeals has not limited the consideration of factors to the three enumerated in § 1404(a) (convenience of parties, convenience of witnesses, or interests of justice); rather, courts in this district are to consider all relevant factors to determine whether the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum. *Jumara v. State Farm Insurance Company*, 55 F. 3d 873 (3rd. Cir. 1995).

8. The Court of Appeals recognized that there are many variants of the public and private interests protected by the language of § 1404(a). *Id*. While analyzing the doctrine of *forum non conveniens*, the Supreme Court in *Gulf Oil Corp. v. Gilbert* provided an outline of private and public factors that a district court might examine when considering a motion to change venue. 330 U.S. 501, 67 S.Ct. 839 (1947); see also *Stewart Organization, Inc*., 487 U.S. at 22 (Supreme Court applying the factors it first outlined in Gulf Oil Corp. v. Gilbert).

A. Factors

9. The factors relevant to this Motion to Transfer include such interests as the convenience of the parties as indicated by their relative physical and financial condition and the convenience of the witnesses, and to the extent that there are witnesses unavailable for trial in this forum *Jumara*, 55 F.3d at 879.

10. Due to reasons associated with his health and the availability of witnesses necessary for the presentation of a complete defense, the United States District Court for the Central District of California is an appropriate alternative venue. As indicated above, Mr. Herklotz resides in California and is forced to travel over 2,000 miles to appear in Pittsburgh to defend this action. Mr. Herklotz's health has been recently deteriorating, making the trip to Pittsburgh extremely difficult. Mr. Herklotz asks the Court to take judicial notice of the fact that air travel in the post-9/11 world is extremely inconvenient, stressful, and fatiguing. If this matter were to remain in the Western

District of Pennsylvania, Mr. Herklotz would be forced to continue to attempt to travel to Pittsburgh at the advanced age of 82. Further, as Mr. Herklotz's health continues to deteriorate, the excessive distance may turn an appearance by Mr. Herklotz into an impossibility.

11. In this case, even though venue is proper in this Court, in view of all of the aforementioned factors, the United States District Court for the Western District of Pennsylvania proves to be a severely inconvenient venue for Mr. Herklotz and the lack of availability of witnesses that are available and subject to subpoena only in California will severely prejudice the presentation of Mr. Herklotz' defense. In the future as his health continues to deteriorate, it will be very difficult and perhaps an impossibility for Mr. Herklotz to appear in Court in Pittsburgh. Therefore, it would be against the interest of justice, and a severe inconvenience for Mr. Herklotz to continue this case in its current venue.

III. CONCLUSION

In conclusion, an analysis of factors pertaining to transfer of venue favor the transfer of venue to California.

WHEREFORE, Defendant, Herklotz, respectfully requests this Honorable Court to enter an Order transferring this cause of action to the more appropriate Central District Court of California.

Respectfully submitted,

By: *John P. Sieminski*

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